**PUBLIC PROSECUTOR**

**v.**

**SAAD MAT TAKRAW & ANOR**

HIGH COURT MALAYA, KANGAR
VINCENT NG J
[CRIMINAL TRIAL NO: 45-02-97]
[1998] CLJ JT(9)
22 MAY 1998

***CRIMINAL LAW:*** *Dangerous Drugs Act 1952, s. 39B(1)(a) - Dangerous drugs - Trafficking in cannabis - Whether proved beyond reasonable doubt - Accused arrested on board a sampan in open seas - Whether offence committed within jurisdiction - Geographical position of sampan - Whether could be taken judicial notice of - Gazetted experts - Evidence of - Evidence Act 1950, s. 57(1)*

***CRIMINAL LAW:*** *Dangerous Drugs Act 1952, s. 39B(1)(a) - Trafficking in cannabis - Whether proved beyond reasonable doubt - Whether "actual knowledge" proved - Evidence of chemist - Microscopic and qualitative chemical tests - Failure to explain how quantity or weight of samples taken from bulk of plant material were representative of the whole - Failure to chemically test not less than 200 grams of plant material - Whether analysis of drug flawed and inconclusive - Whether "adequate quantity" of samples not taken for tests - Whether fatal to charge of trafficking - Consideration of Muhammed Hassan v. Public Prosecutor and Leong Bon Huat v. Public Prosecutor - Dangerous Drugs Act 1952, ss. 2, 37(da), 37(j), 39B(1)(a)*

***EVIDENCE:*** *Evidence of chemist - Dangerous drugs - Trafficking in 192kg of cannabis - Microscopic and qualitative chemical tests - Failure to explain how quantity or weight of samples taken from bulk of plant material were representative of the whole - Failure to chemically test not less than 200 grams of plant material - Whether fatal - Admission of cautioned statements untested in cross-examination - Scope of - Dangerous Drugs Act, 1952 s. 39B(1)(a)*

The two accused in this case were arrested on board a sampan somewhere off the coast of Perlis near the Malaysian – Thailand maritime border. At the time of arrest they had in their custody and control 194 packets of cannabis, stacked in 8 gunny sacks (P5 to P12), and both were charged with an offence under s. 39B(1)(a) Dangerous Drugs Act 1952 ('DDA'), for trafficking in 192 kilograms of cannabis.

At the trial, evidence was adduced by PW5, one Corporal Abdul Manan, that when the sampan was stopped by the police boat PSC 19, the police party was about 2.4 miles from Sungai Baru beach, and that his hand bearing compass then read their position as "bearing light house Sungai Baru 090 degree and bearing light house Kuala Perlis 015 degree". None of the prosecution witnesses, however, affirmed that the geographical position of the police boat at the material time was within Malaysian waters. It was also common ground that upon taking custody of P5 to P12, no fingerprint dusting was conducted by the police, and nor did they take any finger-nail clippings from the accused.

The aforesaid evidence apart, the prosecution had also called in the chemist, who testified, *inter alia:* (i) that he had kept P5 to P12 in a strong room; (ii) that the strong room was crammed with similar drugs belonging to other cases, and was accessible to 5 other chemists; (iii) that it was possibe that P5 to P12 could get mixed up with drug exhibits from the other cases; (iv) that P5 to P12 only totalled 180.844 kilograms in weight; (v) that he had conducted the four standard tests on "representative samples" of P5 to P12 and found them to be 'cannabis' as defined in s. 2 of the DDA; and (vi) that, of the four tests conducted, only the two qualitative chemical tests, namely the Duquenois Levine Test and the Thin Layer Chromatography Test, were conclusive. However, notwithstanding his assertion that "representative samples" were taken from the 194 packets, or that he had taken 32 random samples from the 194 packets when conducting the microscopic test, it was evident that the chemist had said nothing on the quantity or weight of samples taken, or as to how he took the 32 samples from the 194 packets.

The accused, who asserted in their cautioned statements that they thought that they were only transporting contraband goods, submitted at the end of the prosecution case that trafficking had not been proved against them beyond reasonable doubt, and that they ought therefore to be acquitted of the charge. In the circumstances, the following primary questions arose for the determination of the learned judge, namely: (i) Whether there was conclusive proof that the offence was committed within jurisdiction, and in any case, whether the court could resort to s. 57(1) of the Evidence Act and take judicial notice of the geographical position of the sampan at the material time; (ii) Whether the chemist was a competent witness within the meaning of ss. 23A of the Chemists Act 1975, and if so, whether his analysis of P5 to P12 was flawed bearing in mind the "adequate quantity" test in *Leong Bon Huat v. Public Prosecutor;* (iii) Whether the court, in deciding whether to call the defence on the charge of trafficking, ought to consider the definition of "trafficking" in s. 2 of the DDA, and also the element of "actual knowledge" as highlighted in *Muhammed Hassan v. Public Prosecutor*.

**Held:**

**[1]** As the offence was allegedly committed in open seas, it is vital that the prosecution prove beyond reasonable doubt that the offence was committed within Malaysian territorial waters. The prosecution must adduce concrete affirmative evidence on this aspect of the case.

**[2]** The court is in the dark as to the accuracy of PW5's hand compass. The court cannot conjecture from the hand compass reading of PW5 that the police boat, and by reason of its proximity also the sampan, was within Malaysian territorial waters. A question also came to mind as to why the 2.4 miles not calculated in terms of nautical miles, if PW5 is sufficiently competent to take positional bearings. Clearly, this infirmity leaves a grave and lurking doubt as to the geographical location of the alleged offence.

**[3]** Though courts shall judicially notice the territorial extent of the jurisdiction and sovereignty exercised *de facto* by their own government, they are not obliged to judicially notice their precise limits. In any case, the principle of judicial notice only assumes greater relevance in the field of criminal law which involves mere exercise of court's discretion. It would work grave injustice to invoke judicial notice as an aid to prove ingredients of a charge where, as here, affirmative evidence is required to establish a case.

**[4]** A 'gazetted expert' is a creature of statute and the legislature must have intended that such gazetted persons be accepted by the courts as *prima facie* experts without the need to lead evidence to show their expertise in the field of study for which they have been gazetted. Whereas the chemist here was called as an expert witness under s. 45 of the Evidence Act, through evidence being led to establish his expertise. That being so, it matters not whether he was or was not a 'registered chemist' or 'a person authorised under s. 23A' of the Chemist Act 1975. He was a competent witness for the purposes of the instant case. Also, s. 23(2) of the Chemists Act applies only to cases where the certification of the chemist relates to "substance or product *consumed or used by, or intended for the consumption or use of, the public* or any section thereof", which obviously does not include consumption of dangerous drugs.

**[5]** In this case, in order to call the defence on a beyond reasonable doubt, or to convict after the defence case, on a charge of trafficking under s. 39B, without the aid of the "double presumptions", in the wake of *Muhammed Hassan v. Public Prosecutor* and *Mohd Said Samad v.*

*Public Prosecutor* read in the light of *Leong Bon Huat v. Public Prosecutor*, the court must be satisfied that there is evidential proof of actual knowledge of the cannabis by the accused, that the cannabis conveyed or possessed of is not less than 200 grams, and that not less than 200 grams of the said cannabis had been chemically tested. The chemist must also explain as to how the quantity or weight of samples taken from the bulk of 194 packets were representative of the whole.

**[6]** The method in which the chemist took the 32 samples is wholly unsatisfactory. That being so, his assertion on the results of his microscopic examination ought to be completely negated. It is also to be noted that, since the chemist had said that only the two qualitative chemical tests were conclusive tests, it became vital to determine whether the samples taken by him to carry out the two tests were of "adequate quantity" as defined in *Leong Bon Huat*. It follows that, not less than 200 grams of plant material has to be chemically tested in order to prove beyond reasonable doubt that the weight conveyed or possessed of was 200 or more grams of cannabis as defined in s. 2 of the DDA. Only such minimum amount chemically tested could constitute the expression "adequate quantity" used in *Leong Bon Huat.*

**[7]** The two chemical tests are also severely wanting and certainly not conclusive for the purposes of the DDA, given that the plant material was not tested in their totality but by sample, and therefore with the aid of the presumption under s. 37(j) DDA. It was evident that the chemist had failed to adopt the mandatory procedures as set out in s. 37(j), and that, by itself, was fatal to the prosecution case of trafficking.

**[7b]** The court, in any case, cannot convict the accused on the basis only of the physical examination, which was the only test left unimpugned. Though the inconclusive physical and microscopic tests may well establish, on the balance of probabilities, that the plant material is cannabis within the meaning of s. 2 of the Act, it is with the indispensible back-up of the other two qualitative chemical tests that this could be established beyond reasonable doubt.

**[8]** With the huge amount of plant material seized, it is difficult to understand why the chemist did not conduct the chemical tests on at least 200 grams of the plant material, which could have been the best evidence adducible. Considering that it poses no problem for the chemist to conduct chemical tests on the said statutory amount, the presumption under s. 37(j) does not absolve the chemist from the obligation to carry out chemical tests on such statutory minimum amount of the dangerous drug concerned.

**[9]** It is trite law that at the end of prosecution stage of the proceedings a caution statement should not be made the foundation or form the basis of an order of acquittal, since such statements have not been tested in cross-examination. Yet, it is also pretty settled that certain parts of such statements (though untested in cross-examination) may be admitted for the limited purpose of showing the probable reasons for an alleged reaction of an accused, as such statements have already become part of the court record.

**[9a]** The prosecution had failed to establish actual knowledge of the contents in P5 to P12. The prosecution had lost a golden opportunity to show the presence of knowledge, when they failed to take finger-nail clippings from the accused, or conduct finger-print dusting on any of the 194 plastic packets of cannabis. Also, if the accused were then labouring the belief that they were transporting contraband goods, as they asserted, it provides a complete explanation for their "nervous or frightened look".

**[10]** The storage of the P5 to P12 was also unsatisfactory. This was compounded by the unexplained marked discrepancy in the two distinctly different aggregate weights obtained on the 194 packets of plant material, which was 180.844 kilograms by the chemist and 192 kilograms by the police.

**[11]** The definition of 'trafficking' in s. 2 DDA has to be read in conjunction with, and within the context of s. 37(da). So read, the definition constitutes in effect a presumption provision, and is thus caught by the ratio in *Muhammed Hassan* and *Mohd Said Samad*.

**[12]** The prosecution case against the accused had not been proved with that certainty which is necessary to justify a verdict of guilty. And in view of the fact that the court is totally in the dark as to the amount or weight or indeed, the number of samples tested qualitatively, it is precluded from even considering whether to call the defence on an amended charge of possession. Consequently, the court is in no position to tread the path as adopted *in Public Prosecutor v. Mohd bin Ambunani* and *Public Prosecutor v. Alex bin Hamzani.*

*[Accused acquitted and discharged without their defence being called.]*

**Cases referred to:**
*Ang Chwee Keong v. R [1955] 21 MLJ 36* ***(not foll)***
*Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597, [1997] 1 CLJ 686* ***(foll)***
*Bahruni Ismail v. PP [1997] 3 CLJ 267* ***(refd)***
*Chow Kok Keong v. PR [1998] 2 CLJ 469* ***(refd)***
*Cohen Lorraine Philis & Anor v. PP [1989] 2 CLJ 956* ***(refd)***

*Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645* ***(refd)***
*De Silva v. PP [1964] 30 MLJ 81* ***(cit)***
*Jubri v. PP [1962] MLJ 34* ***(refd)***
*Leong Bon Huat v. PP [1993] 3 CLJ 603* ***(refd)***
*Ng Chai Kem v. PP [1994] 2 CLJ 593* ***(refd)***
*Ong Ah Chuan v. PP [1981] 1 MLJ 289* ***(cit)***
*PP v. Adetunji Adeleye Rule [1993] 4 CLJ 173* ***(cit)***
*PP v. Ahmad Husein & Anor (CT No: 47(58) -1-86)* ***(refd)***
*PP v. Alex Hamzani [1995] 3 CLJ 102* ***(foll)***
*PP v. Chew Yoo Choi [1990] 2 MLJ 444* ***(refd)***
*PP v. Lee Ee Teong [1953] 19 MLJ 244* ***(refd)***
*PP v. Lin Lian Chen [1992] 1 CLJ 2086* ***(cit)***
*PP v. Mansor Mohd Rashid & Anor [1997] 1 CLJ 233* ***(cit)***
*PP v. Mohamed Ambunani [1994] 4 CLJ 871* ***(foll)***
*PP v. Saw Kok Leong [1993] 4 CLJ 83* ***(cit)***
*PP v. Zulkifli Omar [1998] 1 CLJ 1079* ***(refd)***
*R v. Wallace 23 Cr App Rep 32* ***(refd)***
*Roslim Harun [1994] 2 CLJ 486* ***(foll)***
*Shukri Mohd v. PP [1995] 3 CLJ 799* ***(refd)***
*Sim Ah Song v. Rex [1951] MLJ 150* ***(refd)***
*Syed Ali Syed Abdul Hamid & Anor v. PP [1982] 1 MLJ 132* ***(refd)***
*Teh Geok Hock v. PP [1989] 2 CLJ 977* ***(cit)***

**Legislation referred to:**
Chemists Act 1975, s. 23(2)(a), (ba), 23A
Common Gaming Houses Act 1953, s. 11(6)
Dangerous Drugs Act 1952, ss. 2, 37(da), (j), 39(B)
Evidence Act 1950, ss. 45, 49, 57(1), 98

**Other source referred to:**
*Sarkar's Law of Evidence,* 13th edn, p 600

*For the Public Prosecutor - Abdul Razak Musa DPP (Ms Quah with him)*
*For the defendants - Jagdeep Singh Deo; M/s Karpal Singh & Co*

*Reported by WA Sharif*

## JUDGMENT

**Vincent Ng J:**

The two abovenamed accused were charged with trafficking in dangerous drugs to wit:

> Bahawa kamu bersama-sama pada 26.1.97 jam lebih kurang 1.30 pagi, di perairan Sungai Baru, bearing rumah api 090 digre dan bearing rumah api Kuala Perlis 015 digre bersamaan 010 digre 06' 02" (UTARA), 06 digre 02' 00" (TIMUR) jarak 2.4 batu dari pantai Sungai Baru, Simpang Empat, di dalam daerah Kangar, di dalam Negeri Perlis, didapati di bawah kawalan kamu mengedar dadah iaitu ganja seberat 192 kilogram yang mana menyalahi peraturan di bawah Seksyen 39B (1)(a) Akta Dadah Berbahaya 1952 Pindaan 1983. Oleh yang demikian kamu telah melakukan satu kesalahan dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[Translated (as in P2) as:

> That both of you jointly on 26.1.97 at about 1.30 am, at Sungai Baru coast line, bearing light house 090 degree and bearing light house Kuala Perlis 015 degree that is, 100 degree 06' 02" (NORTH), 06 degree 02' 00" (EAST) about 2.4 miles from Sungai Baru beach, Simpang Empat, in the district of Kangar, in the State of Perlis, did on your own behalf, traffic in dangerous drugs, to wit 180,844 grams of cannabis in contravention of Section 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1983) and that both of you have thereby committed an offence punishable under Section 39B(2) of the same Act.]

The case for the prosecution, in outline, could readily be gleaned from the evidence of Corporal Abdul Manan bin Long (PW5). And, as the evidence of PW4 and PW5 would feature prominently in the Defence Counsel's submission of no-case-to-answer, their evidence would be narrated in detail. PW5, a member of the marine police for around 18 years, and at the material time attached to the marine police, Bukit Malut, Pulau Langkawi, Kedah, testified that on 26 January 1997 at about 1.30am, he led a party of police personnel consisting of L/Cpl Ahmad Jamil bin Awang (PW6) and L/Cpl Mohd bin Saad (PW7) in a police marine boat no. PSC 19 ('the police boat') to carry out an operation styled as "Ops Nyah Satu" at Sungai Baru waters. He saw an unlighted sampan ('the sampan' – P19) about 100 metres from the police boat, moving very fast. The police party sounded the siren and chased the sampan as it refused to stop. The chase was for a distance of 1 nautical mile in the south direction lasting for 15 minutes, until the sampan finally stopped. He found two male persons on board, identified as the second accused, in front, and the first accused, at the rear of the sampan, and both were then in the state of nervousness and fright. They were each dressed only in long-sleeves shirt and pants, but without jacket. At first sight, the sampan appeared to him

to be carrying a full load of things with a fishing net covering its central portion, and eight (8) large plastic containers ('tongs'). He instructed his personnel to inspect the sampan, and directed them to bring both the accused onto the marine police boat to facilitate inspection. He then took his location on boat PSC 19 with his hand bearing compass, which gave the reading as bearing light house Sungai Baru 090 degree and bearing light house Kuala Perlis 015 degree. He said he was then 2.4 miles from the Sungai Baru beach. He questioned both the accused, frisked them and found nothing incriminating on them. He then boarded the sampan and found a fishing net (P18) covering something. Upon inspection, by pushing aside P18, he found a pink coloured plastic sheet (P22), which, when uncovered, revealed eight striped gunny sacks (P5A to P12A), as shown in photographs P14C, P14E and P14F. There were also eight (8) large plastic containers (P21A to P21H) containing petrol. The sampan was made of fiberglass and did not bear any registration number. At the back of the sampan, he found a Motorola Celcom Art 900 hand phone (P13C). Thereafter, calling through his walkie talkie set, and by firing a signal light, he contacted another police marine boat no. PGR5, which arrived a few minutes later with three police personnel on board. He then instructed, the occupants of PGR 5 to take the two accused in their boat to the Kuala Perlis jetty, and PW6 and PW7 to take the sampan also to the same jetty. As soon as they arrived at the jetty, at about 2.30am, he contacted Insp. Meor Azmi bin Meor Shamsudin (PW10) the investigation officer attached to the narcotics branch. Shortly thereafter, PW10 arrived and he made over to him all the case exhibits including P5A to P12A together with their contents, as well as custody of the two accused.

He ensured that the P5A to P12A with contents were well guarded and not in any way tampered with from the time of their seizure until they were handed over to PW10. He then prepared and issued a search list (P24), the receipt of which the two accused acknowledged by signing thereon. He also appended his signature on each of the eight gunny sacks (P5A to P12A) as well as on each of the 194 plastic packets found in P5A to P12A. A police report registered as Simpang Empat Police Station Report No. 86/97 dated 26 January 1997 (P23) was lodged by him on the above arrest and seizure.

In cross examination, he said that on the day in question he was carrying out an operation known as "Operasi Nyah Satu" against illegal immigrants and unlawful activities under the Dangerous Drugs Act, Customs Act and Immigration Act. 'Operasi Nyah Satu' was, at that material time, carried out close to the Malaysian-Thailand border. He agreed that exhs. 15A and 15B (2 photographs) did not depict any light-house or bore any markings of the point of location where the incident occurred. He agreed that PSC 19 is a speed boat larger in size than the sampan and equipped with powerful engines

for chase purposes. He however denied that there was no hot pursuit or chase after the sampan, but disclosed that no bearings of his position was taken before the 15 minutes chase. He further agreed that because the sampan was grossly overloaded its red draft-line was then below the sea-water level, and that P5A to P12A was not secreted in the concealed compartment ('petak sampan') of the sampan; and that the eight gunny sacks were readily revealed as soon as the fishing net (P18) and pink coloured plastic sheet (P22) were pushed aside. On the seizure of the 194 plastic packets from the sampan mentioned in P23, he added that when those packets were collectively weighed (without the gunny sacks) by PW10 in his presence in the Kuala Perlis Police Station, they gave a total weight of 192 kilograms.

PW5's testimony was supported in material respects by PW6 and PW7. All three police witnesses were in perfect harmony in respect of the 15 minutes duration of the chase, save that PW7 said when they first caught sight of the sampan, it was between 10 to 15 metres away from their boat PSC 19. And, PW6 makes no mention of such distance, but said that the two accused refused to stop the sampan even after the siren had sounded and did not obey instructions to stop.

According to PW6, when the 2nd accused was frisked he was in the state of fright and was shivering ('dalam keadaan ketakutan dan gementar') whilst PW7 noticed that the first accused was shivering ('dalam keadaan menggigil'). However, when cross-examined, PW7 agreed that the first accused could probably be shivering because it was then 1.30 in the morning and he wasn't wearing any thick clothing.

From PW6, defence counsel further succeeded in eliciting and educing evidence highly material to the defence. He revealed that the police marine boat PSC 19 was a speed-boat equipped with, and had, in running operation, a total of 300 horse power (HP) engines – being two engines of 150 HP power each – during the 15 minutes chase, whereas the heavily loaded fiberglass sampan was then driven by a mere 60 HP engine.

PW4, Encik Shaharudin bin Hassan, a government chemist attached to Jabatan Kimia Pulau Pinang, who majored in chemistry from University Kebangsaan Malaysia in 1981, gave expert evidence, which I shall set out verbatim, since the defence has mounted a severe and intense challenge on various aspects of his testimony. He said:

> On 31 January 1997 at about 2.51pm Insp. Meor Azmi bin Meor Shamsuddin (PW10) handed over to me eight cardboard boxes/parcels marked 'A' to 'H' (P5 to P12) respectively, each bearing Simpang Empat Police Report No. 86/97 and a seal of Polis Di Raja Malaysia no. 441. They were all in good

condition and the said seals of Police Di Raja Malaysia were intact. I acknowledged receipt by issuing a receipt (P16) and kept P5 to P12 locked in a strong room. The key to the strong room was held by the Pengarah Jabatan Encik Khoo Ah Kow. Other chemists in my department also had access to the strong room, which was located in an office building. Each chemist including myself were allotted our own respective cabinets in the strong-room. I did not keep P5 to P12 in my own cabinet as they were too voluminous.

I commenced tests on the drug exhibits on 12 March 1997. When I began all the said boxes were in the same satisfactory condition as when they were received from Insp. Meor Azmi. I carried out tests on all the drug exhibits individually and completed on 26 July 1997. I therefore took around four months. I conducted four tests, namely:

i) the physical or visual examination;

ii) the microscopic examination;

iii) the colour test known as *duquenois levine* test (DLT); and

iv) the thin layer chromatography test (TLC).

From the above four tests I concluded that all the plant material in the eight aforesaid boxes were cannabis as defined under section 2 of the DDA.

The total net weight of the cannabis in the eight boxes P5 to P12 was 180,844 grams, derived from: box "A" – 22,467 grams; box "B" – 21,391 grams; box "C" – 23,468 grams; box "D" – 23,370 grams; box "E" – 23,151 grams; box "F" – 21,377 grams; box "G" – 23,208 grams; box "H" – 22,412 grams.

Upon completion of analysis I re-wrapped the exhibits in their original boxes and sealed each of them with the Jabatan Kimia Pulau Pinang seal, with also a sticker bearing laboratory number (Penang) F.O.R 237/97-0 on it. On 26 August 1997, at about 2.30pm, I handed over all the said boxes (P5 to P12) and my chemist-report (P17) to Insp Meor Azmi. All the markings and Jabatan Kimia Pulau Pinang seals on P5 to P12 presently examined by me, are still intact, and I shall now open the eight boxes one by one.

P5 to P12 respectively, contain:

a striped gunny sack marked 'A' (P5A) and 24 plastic packets with contents marked as 'A1 to A24' (P5A1 to P5A24); a striped gunny sack marked 'B' (P6A) and 23 plastic packets with contents marked 'B1' to B23' (P6A1 to P6A23) respectively; a striped gunny sack marked 'C' (P7A) and 25 plastic packets with contents marked 'C1 to C25' (P7A1 to P7A25) respectively; a striped gunny sack marked 'D' (P8A) and 25 plastic packets with contents marked 'D1 to D25' (P8A1 to P8A25) respectively; a striped gunny sack marked 'E' (P9A) and 25 plastic packets with contents marked 'E1 to E25' (P9A1 to P9A25) respectively;

a striped gunny sack marked 'F' (P10A) and 23 plastic packets with contents marked 'F1 to F23' (P10A1 to P10A23 respectively; a striped gunny sack marked 'G' (P11A) and 24 plastic packets with contents marked 'G1 to G24' (P11A1 to P11A24) respectively; a striped gunny sack marked 'H' (P12A) and 24 plastic packets with its content marked 'H1 to H24' (P12A1 to P12A24).

In all, P5 to P12 contained 194 plastic packets (marked as exhs. P5A1 to P12A24 in the manner aforesaid) with certain signatures and dates written thereon. The 194 plastic packets (the 194 packets) contained compact plant material, which was loosen by me while carrying out the analysis. From my analysis all the plant materials is cannabis as defined under s. 2 of the Dangerous Drugs Act 1952 (as amended) ('DDA 1952').

On the first test: I carried out physical examination on 100% of the said plant material, and found that the plant material were all of the same type with physical features similar to that of cannabis. I did not find any foreign material in the plant material.

On second test: I found the plant material bore microscopic features similar to cannabis, and also found an abundance of resin. This test was conducted on all 32 samples taken at random from each of the 194 packets ('ujian ini dilakukan ke atas 32 sampel yang diambil secara rawak dari tiap-tiap 194 peket'). The resin was a sticky and reddish-brown in colour.

From the two tests carried out I concluded that there was a high probability that the plant material was cannabis, and hence, in order to determine with certainty that the plant material was cannabis as defined, I carried out a *duquenois levine* (colour) test and a thin layer chromatography test. The colour test gave a positive result, which showed that the plant material contained canabinoid. And, the Chromatography test also gave a positive result, as two types of canabinoids were traced namely tetrahydrocanabinol and cannabinol. Cannabinol is an active chemical compound ('sebatian kimia aktif') which could only be found in the plant genus cannabis.

Thus, from the result of all the four tests I concluded that the plant material was cannabis as defined under s. 2 of DDA 1952. Cannabis have a distinct smell, the presence of which I detected from the plant material I examined. I myself conducted the analysis on these exhibits during the four months period, and they have not been tampered with. To open the strong room, I would have to get the key from the Pengarah Jabatan, and after returning the exhibits I would lock the strong room and hand the key back to the latter. The exhibits in this case have not been removed or opened without my permission or knowledge.

When he was cross-examined he said:

> It was not everyday during the four months that I carried out the said tests. I took out one by one ('satu persatu') but not all such exhibits every time I carried out the analysis. After I had taken the sample from the plastic packets I would re-wrap the balance plant material ('membungkus semula baki bahan tumbuhan') in the original packets and return them to the strong-room. Until I completed the tests, the boxes P5 to P12 were left open in the strong room. Besides the drug exhibits in P5 to P12 there were also drug exhibits pertaining to other cases which are similarly contained in large boxes or parcels. There were two strong rooms and eight government chemists stationed in Penang, five of whom had access to the particular strong room in which P5 to P12 were kept; and this room is crowded or cramped with exhibits. And, I would not know when the other chemists entered and what they took out from this particular strong room. For all these reasons, I would agree that there is a possibility of a mix-up of the drug exhibits with the exhibits pertaining to other cases. I agree that there is a high probability of traces of cannabinoid resin being found in the finger nails of a person who wraps or packs or handles 194 packets of cannabis. I also agree that the aforesaid first two tests conducted by me (physical and microscopic examinations) were not conclusive.

The last prosecution witness to testify was the head of the narcotic branch, Padang Besar, Perlis, Insp. Meor Azmi bin Meor Shamsudin (PW10), the investigating officer in this case. He said that at about 4.15am on 26 January 1997, acting on instructions, he went to the old Kuala Perlis jetty where he met a group of marine police officers, a sampan (P19) and a police marine boat. In the sampan he found eight striped gunny sacks and he instructed that same and their contents be brought to Kuala Perlis Police Station. He wrote the alphabet "A" to "H" and appended his signature and the date '26 January 1997' on each of the eight gunny sacks (P5A to P12A) respectively. On opening the gunny sacks he received a strong smell of cannabis, and found a total of 194 plastic packets containing plant material which he suspected to be cannabis. He then weighed them – without the gunny sacks – and found their total weight to be 194 kilograms. These exhibits were then locked in the police lock-up Kuala Perlis before they were moved to the Kangar District Police Headquarters, on the same day at around 9.15am. On 29 January 1997 he instructed a police photographer Corporal Mohd Fadir Zainal (PW3) to take photos (P14H to P14W) of the case exhibits. On 31 January 1997 he entered all the drug exhibits into eight cardboard boxes (P5 to P12) which he also marked "A" to "H" – a la the gunny sacks. The said exhibits were kept locked in his office in Ibu Pejabat Polis Daerah (IPD) Kangar until their delivery to the Chemistry Department, Penang on 31 January 1997 by him personally. On 26 August 1997, PW10 together with other police personnel went to Jabatan Kimia Pulau Pinang to collect the return of the said exhibits together with

the chemist's report (P17), which were then safely kept under lock and key in his room.

In cross-examination he admitted that he did not conduct dusting for finger-prints on any of the 194 plastic packets and neither did he take any finger nail clippings from the two accused. He further agreed that because of the large number of plastic packets involved it would have been easy to lift finger-prints from the smooth surfaces of the packets, as well as to detect traces of cannabis resin in nail clippings of persons who handle or pack such packets of cannabis. And, he did not make any attempt to secure the itemised phone bill on the use of P13C (Celcom Art 900 handphone) for phone calls, if any, for period from 25 January 1997 to 26 January 1997. He had no knowledge whether both the accused were kept separately or together in a single cell in the lock-up in the police stations in Kuala Perlis and Kangar.

After the testimony of PW10, the prosecution offered eight (8) witness to the defence and closed its case. The defence declined to call any of the eight witness offered, and proceeded to submit that the defence ought not to be called, upon grounds, which I have deliberated and resolved under captions as hereinbelow – with ratiocination.

***Standard Of Proof***

First, I must state that as the date of the alleged commission of the offence as per the charge, reads 26 January 1997, both the prosecution and defence readily agreed that the standard of proof applicable herein at the end of the prosecution stage would be proof beyond reasonable doubt (see *Arulpragasan a/l Sandaraju v. PP* [1997] 1 MLJ 1, read with *Bahruni bin Ismail v. PP* [1997] 2 MLJ 265 and *Dalip Bhagwan Singh v. PP* [1998] 1 MLJ 1).

***Cannabis Or Indian Hemp?***

To capitalise on the ratio of the Supreme Court in *Shukri bin Mohd v. PP* [1995] 3 MLJ 229 defence counsel raised the issue, that as PW4 had stated in cross examination that the word "cannabis" is synonymous with "Indian Hemp", an uncertainty has arisen on the degree of seriousness of the offence, which should be resolved in favour of the two accused and result in their acquittal, as the DDA 1952 no longer outlaws Indian Hemp (as of 12 April 1996). This point taken appears to me to be a feeble challenge, uttered in virtual undertones with tongue in cheek. It is wholly untenable and without merits, as, whereas the chemist in *Shukri bin Mohd (supra)* had said that the substance he had analysed showed that it was "cannabis as defined in the Dangerous Drugs Act 1952", without mentioning s. 2 of the Act, PW4 had

asserted and repeated that the plant material he analysed was "cannabis as defined in s. 2 of the DDA". Furthermore, he had not said that what he examined may also have been Indian Hemp or Cannabis (Indian Hemp). Thus, when he said that "Cannabis is synonymous with Indian Hemp", he was merely expressing a confused opinion, when pressed by counsel, and not expressing the result of his analysis of the plant material in P5A to P12A.

***Chemist***

The defence counsel also contended that as PW4 failed to state that he was a registered chemist or that he was an authorised person under s. 23A of the Chemists Act 1975 (Act 158), his analysis and examination of the plant material ought therefore be discarded in its entirety by virtue of s. 23(2)(a) and (ba) of the same Act, which reads as follows:

> (2) No person shall give or provide in a determinative capacity, or certify or declare in writing the result of, any chemical analysis for the purpose of determining the composition or specifications of any substance or product consumed or used by, or intended for the consumption or use of, the public or any section thereof, unless:
>
> (a) he is a registered chemist;
>
> (ba) he is a person authorised under section 23A for the purposes of this subsection and gives or provides, or certifies or declares in writing the result of, the chemical analysis for the purpose and in the course of his employment;

In my view, there are two types of experts, namely:

> (i) gazetted experts, such as gaming experts appointed by gazette notification under section 11(6) of the Common Gaming Houses Act 1953
>
> and
>
> (ii) experts that come within the purview of sections 45 to 49 of the Evidence Act. Section 45(1) reads:
>
> When the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinion upon that point of persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts. (2) Such persons are called experts.

A 'gazetted expert' is a creature of statute, such as the Common Gaming Houses Act 1953, wherein s. 11(6) (which came into effect only on 20 January 1984) states that "the minister may by notification in the gazetted appoint any person whether a public officer or not to be a gaming expert in respect of any or all games." My considered view is that, by this special provision the legislature must have intended that such gazetted persons be accepted by the courts as *prima facie* experts without the need to lead evidence to show their expertise, which pertains directly to the field of study for which they have been gazetted as experts. Otherwise, the provision in s. 11(6) would be otiose, in view of s. 45 of the Evidence Act 1950 (Act 56), which Parliament is presumed to be aware of at the time of the insertion of the said provision by the Amending Act A577. Consequently, that part of the two similar judgments in *PP v. Lee Ee Teong* [1953] 19 MLJ p. 244 and *Ang Chwee Keong v. R* [1955] 21 MLJ p. 36, which postulated that evidence must be led by the prosecution to establish the expertise of the gaming expert is, in my considered opinion, no longer good law. It is germane to note that both *Lim Ee Teong* and *Ang Chwee Keong (supra)* were decided long before the introduction of s. 11(6). Therein, the witnesses were called not as gazetted experts, but as expert witnesses under s. 45, 49 and 98 of the Evidence Act, and hence, the dicta of Brown Ag CJ, in the Singapore case of *Sim Ah Song v. Rex* [1951] MLJ 150 – requiring evidence to be led to establish expertise – was quite rightly adopted. In a short, easily digestible judgment, written in plain matter of fact, frugally crafted facile language typical of those good old unhurried days – which makes for delightful reading and a boon to law journal publishers who have also to contend with escalating cost of printing material – he said (at p. 151):

> The responsibility for the determination of this question, as in the case of every question upon which expert evidence is called, rested upon the court and not upon the expert. The business of an expert witness is to draw upon the store of his knowledge and experience in order to explain some matter which his experience should qualify him to understand. He is quite entitled to express his opinion, which indeed is the natural corollary of his explanation. But a bare expression of his opinion has no evidential value at all. **Unless he gives an explanation which supplies the understanding of the subject which the court lacks,** the court is in no better position than it was before to determine the question which it is its duty to determine, and if the court acts upon a bare expression of the expert's opinion the determination of the question becomes that of the expert and not of the court. (emphasis supplied)

In contrast, where a witness is called as an expert under s. 45 to s. 49 of the Evidence Act, evidence would need to be led to show and to establish his expertise to the court's satisfaction. Such an expert may even include expertise on custom, cultural practices and usages, called to assist the court when it

has to form an opinion on matters of science or art, handwriting or custom or usages which could only be acquired by special training or experience. Clearly, PW4 had been called as an expert witness under s. 45 of the Evidence Act, through evidence being led to establish his expertise. This being the case I would hold that it matters nought whether he was or was not a 'registered chemist' or 'a person authorised under s. 23A'. I am minded to rule that he was a competent and relevant witness in court for the purposes of the instant case. I cannot see how s. 23(2) of the Chemists Act 1975 could be invoked by the defence in its aid. In any event, it would appear that this provision is only applicable where the certification of the chemist relates to "substance or product **consumed or used by, or intended for the consumption or use of, the public** or any section thereof" (emphasis added), which obviously does not include consumption of dangerous drugs.

***Jurisdiction***

The defence submitted that there was inconclusive proof that the offence was committed within Malaysian jurisdiction, and indeed, PW5 had failed to establish the reliability of the manner in which the geographical bearings were taken.

It is incontrovertable that the prosecution has to proof every ingredient of the charge. See *Arulpragasan a/l Sandaraju v. PP* [1997] 1 MLJ 1. And, as the alleged offence was committed in the open seas, and unlike *terra firma*, the sea is incapable of bearing a fixed address, it becomes a vital and essential element of a charge such as the current charge, to prove beyond reasonable doubt that the offence was committed within Malaysian territorial waters. A given location at sea could quite easily be plotted by an art of science, familiar to the initiated but esoteric to the uninitiated, which includes members of the Bench. As it is common ground herein that it occurred in the open sea, the crucial question to determine would be: was it on high seas, being the area of the sea not within the jurisdiction of any nation but the free highway of all nations, or was it in the open sea within Malaysian or Thailand or Indonesian jurisdiction? My suspicion is that it may have occurred in Malaysian waters, but such suspicion however grave or weighty cannot found a conviction so as to send a man to the gallows. The only way to lift the level of proof from the realm of suspicion to tangible proof beyond a doubt, is to adduce concrete admissible and acceptable affirmative evidence on this particular aspect of the case.

PW5 testified that after the 15 minutes chase and the sampan had stopped, he took a reading with the aid of his hand bearing compass which gave his position on boat PSC 19 to be, bearing light house Sungai Baru 090 degree and bearing light house Kuala Perlis 015 degree. He further added that he was

about 2.4 miles from Sungai Baru beach. When cross-questioned, he admitted that he did not take any bearings before the 15 minutes chase – southwards – and his operation 'Ops Nyah Satu' occurred at the Malaysian-Thailand border. He also agreed that in the two photographs (P15A and P15B) of the scene of offence did not depict any light-house and there were no markings thereon to indicate the locus of the offence. The sincerity of his belief that he was 2.4 miles from the beach is irrelevant, but the basis and foundation of such belief is relevant and necessarily determinable.

What struck this court was that PW5 did not go further to say that from his readings of the hand compass, he was able and did conclude that the geographical position of his boat PSC 19 at the material time was within Malaysian waters; even though it would have been all too easy for him to say so if, in fact, he had no doubt about it. Likewise, his police report (exh. 23) failed to state that the bearings taken meant they were within our jurisdiction. Furthermore, neither PW6 nor PW7 mentioned anything about their location then. PW5 said that he was then 2.4 miles from Sungai Baru beach, but gave no indication of what instrument he used to get this estimate of his distance from Sungai Baru beach; surely a hand bearing compass cannot measure distance. Was his marine boat equipped with radar or something like a road-vehicle odometer, for measuring distance? Or, does he expect this court to conduct its own research on his geographical position so as to conjecture to a conclusion, that from the hand compass reading he obtained at that critical time, the police boat – and, by reason of its proximity, also the sampan – was within Malaysian territorial waters. Again, this court is in the dark as to the accuracy of his hand compass, its calibration, its functional condition and nature, and whether its employment is a recognised norm for taking the geographical bearings of a given position at sea. And again, the question that comes to mind is why the 2.4 miles was not calculated in terms of nautical miles, if PW5 is sufficiently competent to take positional bearings; and why, if the distance was only 2.4 miles from the beach, no light house is depicted or could be detected in P15A and P15B. Although, he said that the 15 minutes chase was in the southwards direction, it did not help the prosecution's case, as he did not say whether it was with the aid of eg, a compass that he gathered that he was heading southwards in the chase. This was further compounded by the fact that he had agreed under cross-examination that: operation 'Ops Nyah Satu' was conducted close to the Thai-Malaysian border; P15A and P15B did not indicate or reveal any reference point from which their position could be gauged; and, he did not take any bearings of the original stationary position of police boat PSC 19 before the alleged chase.

All available instruments of science ought to be used to effectively counter cases of large scale trafficking in drugs, a crime of which the motive is cold calculated greed. Indeed, a highly reliable tracking system, soon to be manufactured locally, known as the Global Positioning System (GPS) is (I am given to understand) readily available for installation on police marine boats, since this system is already being installed in DRM-Hicom's Malaysia-made Hicom Handalan military trucks. The automatic tracking and operations monitoring (Atom) in a G.P.S system, relies on navigation satellites, and is reputed to be able to calculate positions up to an accuracy of a few metres anywhere on earth.

***Judicial Notice***

Thus, by reason of the probative frailty of the evidence of PW5 revealed above, it is not unexpected that the learned deputy found necessary to suggest that this court could arrive at a conclusion on the geographical position of the sampan by taking judicial notice on matters of geography.

The facts of which the court shall take judicial notice under s. 57(1) of the Evidence Act 1950 includes, *inter alia* (under para. (j) of the provision) "the ordinary course of nature, natural and artificial divisions of time, the geographical divisions of the world, the meaning of Malay and English words, and public festivals, fasts and holidays notified in the Gazette or in any State Gazette;".

The expression 'Geographical divisions' is amply defined in *Sarkar's Law of Evidence* (13th Edn.) at p. 600 which states:

> Geographical Divisions. Courts also recognise the principal geographical divisions. Thus, they judicially notice the territorial extent of the jurisdiction and sovereignty exercised *de facto* by their own government; and the local divisions of their country, such as states, provinces, counties, counties of cities, cities, towns & etc. **But courts are not obliged to judicially notice mere local divisions, nor their precise limits.** ... Judicial notice is taken of the counties into which England and Wales are divided, and of those which are maritime counties, **but not of the distance of one county from another,** nor the particular places situated within each county, unless such situation is recognised by statute, nor of the particular diocese within which a town is situated. (emphasis added).

Thus, though the courts shall judicially notice the territorial extent of the jurisdiction and sovereignty exercised *de facto* by their own government yet the courts are not obliged to judicially notice their precise limits; and in the case of the open seas, unlike *terra firma,* the courts are also not obliged to judicially notice the territorial extent or distance of one country from another

or limits of their territorial waters as determined through maritime conventions or treaties from time to time, unless there is before the court evidence of such conventions or treaties. The principle of judicial notice may assume greater relevance in the field of criminal law on the question of sentence (see my decision in *PP v. Zulkifli Omar* [1998] 1 CLJ 1079) which involves mere exercise of the court's discretion. But, as discretion has no place in the crucial deliberation towards a verdict of guilt or innocence, the courts should be averse to apply it as supplementary evidence to fill up gaps in affirmative evidence – a *fortiori,* on any evidential aspect pertaining to essential ingredients of an offence where strict proof is necessary. Clearly, it would work grave injustice to invoke judicial notice as an aid to prove any ingredient in a charge where affirmative evidence is required to establish a case beyond a doubt. There should be material before the court that is logically probative, of facts sufficient to constitute the offence for which an accused is charged. In justice, actual factual evidence necessary to establish strict proof of the essential ingredients of a charge should not be supplanted by the exercise of judicial notice.

In any event, in the current case, it is not of any material importance even should this court fail to take judicial notice of any geographical fact, as I have also found that PW5's manner and method of arriving at his bearing readings and the 2.4 miles sea-distance from Sungai Baru is wholly unsatisfactory. This infirmity, when considered in the light of P14A and P14B, leaves a grave and lurking doubt in my mind as to the geographical location of the alleged offence. See *PP v. Ahmad bin Husein & Anor* (Criminal Trial No. 47(58)-1-86 High Court, Kota Bahru – Mallal's Digest – 4th Edn – 1996 Reissue Vol. 4 p. 87 para. 208) – Cor: Idris J – whether the offence was committed on the Malaysian side of the river.

***Chemist's Tests***

The next point, robustly taken and ably argued, with uncommon forcefulness by Mr. Jagdeep Deo was that the tests and analysis carried out by the Government Chemist (PW4) on the drug exhibits was wholly unsatisfactory and inconclusive.

In my judgment, since the Government chemist had said that only the two qualitative chemical tests (DLT and TLC) were conclusive tests (the first two, namely the physical and the microscopic examination were inconclusive tests) it is the vital duty of this court to determine whether the samples taken by him are of "adequate quantity" as defined in *Leong Bon Huat v. PP* [1993] 3 MLJ 11. He has also to explain how the quantity or weight of samples taken from the bulk of 194 packets were representative of the whole. Thus, it stands

to reason that bare assertions such as "representative samples" would fall short of the "adequate quantity" test laid down by the Supreme Court in *Leong Bon Huat (supra).* Unless chemical tests have been conducted on 100% of the 194 packets (see *PP v. Chew Yoo Choi* [1990] 2 MLJ 444) reliance would have to be placed on the presumption provision in s. 37(j), which would require tests to be carried out on at least 10% of the 194 packets ie, at least 19 packets. Compliance with this requirement is clearly mandatory in order to invoke s. 37(j). It follows that in the instant case any sample for chemical analysis taken from less than nineteen packets would be insufficient to satisfy the "adequate quantity" (of samples) requirement.

PW4 has not enlightened this court as to the weight or the number of samples or the number of packets from which the samples had been taken (indeed, whether any samples at all had in fact been taken) to enable him to carry out the two qualitative chemical analysis leading to his "conclusive results". Even in respect of the second (microscopic) inconclusive test, he only said he took 32 samples but he did not explain how he could have taken 32 samples from "each of the 194 packets" – whether it was 4 samples from each of 8 packets or eight samples from each of 4 packets or 32 samples from each of 32 packets; and whether it was 2 grams or 4 grams or 7 grams per sample, and how were they representative of the whole bulk of plant material seized. Hence, the method in which he took the 32 samples is wholly unsatisfactory and ambiguous at best. In the result, I find his assertions on the results of his microscopic examination (second test) to be completely negated.

Most importantly, the third and fourth (qualitative) tests are severely wanting and certainly not conclusive for the purposes of the DDA 1952, given that it is common ground that the plant material was not tested in their totality but by sample, and therefore with the aid of the presumption under s. 37(j). Yet he had failed to adopt the mandatory procedures set out in s. 37(j), which by itself would be fatal to the prosecution case of trafficking. Also, in view of the fact that this court is totally in the dark as to the amount or weight or indeed, the number of samples tested qualitatively it is precluded from even considering whether to call the defence on an amended charge of possession; if, for example, the chemist had conducted chemical testing of a specific amount of sample of less than 200 grams of plant material and confirm it to be cannabis as defined under s. 2 of the DDA. Consequently, this court is in no position to tread the path adopted in the cases of *PP v. Mohd bin Ambunani* [1994] 4 CLJ 871 and *PP v. Alex bin Hamzani* [1995] 3 CLJ 102.

There is yet another feature of the chemist evidence which I find wholly unsatisfactory, and has failed to withstand the strict test of curial scrutiny. He said that though each Government Chemist had his own cabinet in the strong-room, the eight boxes P5 to P12 were not kept in the cabinet assigned to him because the exhibits were too voluminous. Analysis of the plant material commenced on 12 March 1997 and completed on 26 July 1997 – a period of well over four months. In cross-examination he said that until he completed analysis, the eight boxes P5 to P12 which contained the 194 packets of plant material were left open in the strong room, measuring roughly 20' x 15'. He disclosed that besides the eight large boxes, (P5 to P12), there were also other similar large boxes of drug exhibits belonging to other cases, and, he does not know whether same were also left open. There were eight Government Chemists in Chemistry Department, Penang, five of whom had access to the particular strong room in which P5 to P12 were stored. And, he would not know who among them has had access to or when they entered into, or what they had taken out from that strong room. He acknowledged that the condition of the strong room in which P5 to P12 were stored, was packed and crammed, and because there were also similar large boxes of drug exhibits in that particular strong room, accessible to five Government Chemists, there was a possibility of mix-up of the drug exhibits in the current case with similar exhibits from other cases.

All the above unfortunate surrounding circumstances in regard to the manner in which the drug exhibits were kept during the period from commencement to completion of tests, is further compounded by the unexplained marked discrepancy in the two distinctly different aggregate weights obtained on the 194 packets of plant material by PW4 and PW10, being a weighty weight differential of about twelve (12) kilograms. It is a tangible truism, that a set of peculiar figures do invariably have a unique way of ascribing a certain identity feature to a subject or an object. In the instant case the peculiar figure is the 180.844 kilograms that PW4 said was the total net weight of the plant material in the 194 packets. He did not weigh the 194 plastic packets emptied of their contents. Whereas, PW10, the investigating officer who also weighed the 194 plastic packets with the contents of plant material, testified that the gross weight was 192 kilograms. Even though he hasten to add that it was a rough weight, he did not explain why it was so. It is highly improbable that the 194 empty plastic packets could have tipped the scales at about 12 kilograms. And, in my considered opinion, the common practice of allowing 10% for mechanical error in vehicle overloading and speeding cases is inapplicable in cases which concern identity of any exhibits including drugs exhibits – all the more so, in a capital charge.

Granted, that each of the 194 packets bore sufficient identity markings, *viz* PW5's signature on each packet, yet, on account of the above unsatisfactory conditions of storage of the drug exhibits disclosed by PW4, and the marked differential in the two weights given by PW4 and PW10, it becomes necessary for the court to be satisfied that the 32 samples taken by PW4 for the second (microscopic) test were from the 194 packets bearing such signatures of PW5. This, the court is far from certain as PW4 failed to state that each of the packets from which he had taken samples for his second test carried the signature of PW5. So, even in this regard, PW4's evidence leaves a serious doubt in the court's mind and his second test is, I find, unacceptable. In short, the question entailed is: could this court convict the accused on the basis only of the physical examination (the first of the four tests) being the only test left unimpugned after strict curial scrutiny?

***The Position Post-Muhammed Hassan And Mohd Said Samad***

In my considered judgment, I would hold that in order to call the defence on a beyond-reasonable-doubt standard of proof, or to convict after the defence case, on a charge of trafficking under s. 39B – without the aid of the "double presumptions" – in the wake of the decisions in *Muhammed bin Hassan* and *Mohd Said bin Samad* read in the light of *Leong Bon Huat v. PP* [1993] 3 MLJ 11, the court would have to be satisfied on all the following three collective factors:

(a) there is evidential proof of actual knowledge, or circumstances clearly pointing to knowledge of the dangerous drugs conveyed or possessed of (ie, evidential or factual finding of possession as understood in Criminal Law, as opposed to presumption or 'deemed' knowledge); **and,**

(b) the dangerous drugs conveyed or possessed of is not less than 200 grams, in respect of cannabis, and not less than 15 grams, for heroin; **and,**

(c) the two qualitative (conclusive) tests drawing positive results have been conducted by the Government chemist on an amount of not less than 200 grams of plant material in respect of cannabis and not less than 15 grams, for heroin.

It is important to bear in mind that though first two (physical and microscopic examination) tests – both being inconclusive, according to the chemist – may well establish, on the balance of probabilities that the plant material is cannabis within the meaning of s. 2 of the Act, it is only with the indispensible back-up of the other two qualitative chemical tests that, that could be established beyond a reasonable doubt.

With respect, I would readily adopt and agree with the views expressed by Ian H.C. Chin (J) in *PP v. Mohamed bin Ambunani* [1994] 4 CLJ 871 and Tee Ah Sing JC (as he then was) in *PP v. Alex bin Hamzani* [1995] 3 CLJ 102 that not less than 200 grams of plant material has to be chemically tested in order to prove beyond reasonable doubt that the weight conveyed or possessed of was 200 or more grams of cannabis as defined. It would appear that both decisions were guided by the ratio in *Leong Bon Huat (supra)* which, I must add, has not, in any material respect, been overruled by the decision in *Roslim bin Harun* [1994] 2 MLJ 132. Surely, in my opinion, in a capital charge involving a man's life, and hence essentially subject to strict curial scrutiny, it is not too much to require that the chemist carry out chemical tests on not less than the statutory minimum amount required to trigger the presumption under s. 37(da), so as to prove beyond reasonable doubt quantitative breach of such statutory minimum. It would follow that only such minimum amount chemically tested could constitute the expression "adequate quantity" used in *Leong Bon Huat (supra)*. With such huge amount of plant material seized in the present case, it is difficult to understand why, in a charge of this nature, the chemist did not conduct the chemical tests on at least 200 grams of the plant material, which would have been the best evidence adducible; notwithstanding that s. 37(j) does not refer to the "ten per centum" (10%) by weight or quantity of the substance, but rather, by the number of receptacles holding the substance.

Considering that it poses no problem for the chemist to conduct chemical tests on the said statutory minimum amount of a given dangerous drug, it is my opinion that the presumption under s. 37(j), construed in the dim, blur light of the unsatisfactory manner in which it was crafted, does not absolve the chemist from his obligation to carry out chemical tests on such statutory minimum amount of the dangerous drug concerned. In arriving at this conclusion, no doubt on the basis of, and with keen awareness that s. 37(j) is couched as a presumption provision – nay, of the same ilk as s. 37(d) and (da) – I have merely carried to its logical conclusion (and as a corrollary to) the expressed rationale in the Federal Court's decision in *Mohammed bin Hassan (supra)*, which was very forcefully and admirably articulated by Chong Siew Fai (CJ Sabah and Sarawak) in the following language (at p. 289-B):

> In view of the above differences, it would be unduly harsh and oppressive to construe the automatic application of presumption upon presumption as contended by the learned deputy public prosecutor – a construction that ought to be adopted only if, upon the wordings of the two subsections, such an intention of the Parliament is clear, which, in our opinion, is not.

And, at p. 291, he again emphasised:

> In our view, on the wording of s. 37(da) as it stands, to read the presumption of possession (ie possession as understood in criminal law with knowledge) provided in s. 37(d) into s. 37(da) so as to invoke against an accused a further presumption of trafficking (ie presumption upon presumption) would not only be ascribing to the phrase 'found in possession' in s. 37(da) a meaning wider than it ordinarily bears but would also be against the established principles of construction of penal statutes and unduly harsh and oppressive against the accused.

***The Need To Prove And The Manner Of Proving Actual Knowledge Of The Dangerous Drug***

Even assuming that the material features of the chemist's evidence were satisfactory and the geographical question has been resolved in the prosecution's favour (both of which issues this court has found against the prosecution) a vital question would yet have to be determined, namely: whether the defence could be called on a charge of trafficking (as opposed to 'deemed possession' by operation of s. 37(d)). To determine this question within the confines of the binding authority of *Muhammed bin Hassan (supra)*, this court would have to examine the evidence and arrive at a deliberate finding of fact as to whether the prosecution had succeeded in proving beyond reasonable doubt that the two accused had actual knowledge of the cannabis material in P5A to P12A found in their 'custody or under their control' in the sampan. In this regard, I find that both of them had custody or control of the eight gunny sacks (P5A to P12A) and the sampan (P19). And, additionally, after studying the authority of *Syed Ali bin Syed Abdul Hamid & Anor v. PP* [1982] 1 MLJ 132, I would hold that unlike a car, the eight gunny sacks could come within the meaning of "anything whatsoever" mentioned in s. 37(d); so also, in my view, could the sampan come within the same definition, due to its small size.

I had made a careful and meticulous study of the following circumstantial evidence led by the prosecution in their attempt to prove that the two accused had actual knowledge of the presence of cannabis plant material in P5A to P12A, so as to establish the requisite ingredient of evidential possession (as opposed to presumption or 'deemed' possession under the 'compelling or legal presumption'):

(i) PW5, PW6 and PW7 all gave virtually harmonious testimony, that as soon as their marine police boat no. PSC 19 sounded the siren the sampan refused to stop, it sped away and they gave chase for a duration of around 15 minutes. Even on this score, it is interesting to note that whereas PW5 had said that when they first caught sight of the sampan and before

sounding the siren, the police marine boat was 100 metres away from the sampan, PW7 told this court that, at that point in time, the boat and the sampan was only between 10 to 15 metres apart.

When cross-questioned, PW5 agreed that the boat PSC 19 was a speed-boat, larger than the sampan and designed for pursuit purposes, whereas the sampan was then grossly overloaded, to such extent that the sampan's red "draf line" was below water level. PW6 was candidly even more specific in this regard, when he revealed, in cross-examination, that whilst the sampan was full and heavily laden, and driven by a mere 60 horse power engine, the boat PSC 19 was equipped with two engines of 150 horse power each, which – with a total capacity of 300 horse power – were switched on and churning.

Thus, in view of the vast difference in load and engine power between the boat PSC 18 and the small, grossly overloaded sampan (with the two accused persons, eight containers ("tong") of petrol and about 200 kilograms of other contents) it is most improbable and inherently incredible that a chase had occurred between the two vessels, least of all for a duration of 15 minutes, as alleged. It is a story as incredible as the proverbial cow-jump-over-the-moon tale, and therefore it makes not an iota of difference on the scale of probity whether one or five police witnesses had affirmed this piece of evidence. Such evidence ought to be discounted, and I find that there was no chase of – or absconding by – the sampan. (See *PP v. Mohd. Ali* [1962] 28 MLJ 257).

(ii) PW5 noticed that both the two accused looked worried and frightened when the sampan stopped after the 15 minutes chase. PW6 also stated, in unison, that when he frisked the second accused and found nothing, he noted that the latter was frightened and was shivering. In my view, one's opinion of another person's appearance or body language is often highly subjective in interpretation and variable in nature – human perception being what it is. In the same vein, even evidence of absconding does not irrefutably point to guilt as it may be of an equivocal nature, because sometimes an innocent person may run away out of fright or misapprehension or preference to abscond rather than face the ordeal of a trial.

I am mindful of the position in law that contradictions and discrepancies or even demonstrable falsehoods in the evidence of a witness are not sufficient reason for rejecting the whole of the evidence of such witness, though it may be viewed with suspicion and treated with caution (see *De Silva v. PP* [1964] 30 MLJ 81). In the present case, even if both the accused persons were

shivering, the court would also have to note in their favour the part in PW5's testimony, where he said that the two accused were wearing only long sleeved shirts without any jacket or thick clothing. Added to this, PW7 also agreed with defence counsel's suggestion that as it was 1.30 in the morning, the first accused examined by him, may have been shivering because of the cold morning air.

Furthermore, considering this aspect of the prosecution evidence, the court may look at a part of the contents of the respective caution statements of the two accused (D25 by the first accused and D26 by the second accused) for further explanation, though I must hasten to add, that it is unnecessary to use any part of D25 or D26 at this stage in the proceedings, considering my views aforesaid.

It is trite law that at the end of prosecution stage of the proceedings a caution statement should not be made the foundation or form the basis of an order of acquittal, since such statements have not been tested in cross-examination. Yet, it is also pretty settled that certain parts of such statements (though untested in cross-examination) may be admitted for the limited purpose of showing the probable reasons for an alleged reaction of an accused, as such statements have already become part of the court record. (See *PP v. Lin Lian Chen* [1992] 2 MLJ 561 – at p. 568, *P.R v. Mansor bin Mohd. Rashid & Anor* [1996] 3 MLJ 560, *PP v. Adetunji Adeleye Rule* [1993] 2 MLJ 70 at 74 G) and also my decision in *PP v. Saw Kok Leong* [1993] 4 CLJ 83.

In the two cautioned statements, both the accused had similarly asserted that a character named Sham had asked them to transport "barang-barang larian cukai" ie, a consignment of contraband. It would follow that, if they were then labouring under the belief that they were transporting contraband goods, it could provide a complete explanation for their "nervous or frightened look". Notably, there is material similarity in their statements in both the cautioned statements (D25 and D26). And in this regard, it is pertinent to bear in mind that the investigating officer (PW10) when questioned, could not say whether the two of them were, at any time, placed in a common cell in the police lock-up in Kuala Perlis and Kangar; nor could he enlighten the court as to who, in the police force, would be privy to this information.

So, considering that the prosecution had failed, as adumbrated in (i) and (ii) above, to establish actual knowledge of the contents in P5A to P12A, it is indeed unfortunate that the prosecution had lost a golden opportunity to show the presence of knowledge, when PW10 confirmed that he did not take any finger-nail clippings from any of the two accused, and neither did he conduct dusting for finger prints on any of the 194 plastic packets containing the plant material. This feature of the evidence has to be weighed in the context of

PW10's answer in cross-examination that the plastic packets bore smooth surfaces, from which it would have been easy to detect and lift finger prints, and his acknowledgment, that because of the large number of packets involved, any person who handles or packs the plant material would have traces of it in his finger nails. And, it is of further material relevance that PW4 (the chemist) also held similar views in this regard.

Then, at the eleventh hour in his submission the learned deputy proffered an astounding suggestion that the prosecution was not at all relying on s. 37(da), but rather, on the definition of "trafficking" in s. 2 of the Act. It was intimated to him that he had already taken this point earlier in his submission, albeit as an alternative submission – s. 37(da) *vis a vis* s. 2 – rather than in absolute terms.

The prosecution's contention – which drew its inspiration from dicta in *Ong Ah Chuan v. PP* [1981] 1 MLJ 289 and *Teh Geok Hock v. PP* [1989] 3 MLJ 162 – was that in deciding whether to call the defence on the charge of trafficking the court ought to consider the definition of "trafficking" in s. 2 of the DDA which reads:

> "trafficking" includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug;.

In so far as the decisions in *Teh Geok Hock* and *Ong Ah Chuan* imply that passive possession or self administration can never be a defence to a charge of trafficking under s. 39B of the DDA 1952, this has been severely watered down by the two Supreme Court cases of *Cohen Lorraine Philis & Anor v. PP* [1989] 3 MLJ 289 and *Ng Chai Kem v. PP* [1994] 1 AMR 889. Indeed, the recent Federal Court decision in *Chow Kok Keong v. PR* [1998] 2 AMR 1401, went even further to hold that the meaning given in s. 2 of the Act for 'trafficking' is inapplicable as an alternative to or in place of s. 37(da) in a charge of trafficking. The crux of the Federal Court's rationale in that decision could more conveniently be summarised as: (a) the provisions of s. 37(da) specifically confer upon the accused the right to rebut the presumption of trafficking arising from being found in possession of dangerous drugs in excess of the statutory minimum; (b) s. 2 itself contains the proviso "unless the context otherwise requires"; (c) the drugs legislation is a piece of highly penal legislation and therefore any ambiguity in it should be resolved in favour of the subject; (d) consequently, the provision in s. 37(da) would prevail over the definition in s. 2 of the Act. See also *Syed Ali bin Syed Abdul Hamid & Anor v. PP* [1982] 1 MLJ 132.

I have no difficulty in readily agreeing with the aforesaid rationale, lucidly expressed by Edgar Joseph Jr, FCJ, who delivered the judgment of the panel. As I see it, the definition of 'trafficking' in s. 2 has to be read in conjunction with, and within the context of s. 37(da); and if so read, the definition itself would constitute in effect a presumption provision, and thereby, also caught within the ratio in *Muhammed Hassan* and *Mohd Said bin Samad (supra).*

***Conclusion***

In the event, for all the above reasons, and after having regard to the totality of the prosecution evidence, I find that the prosecution case against the two accused had not been proved with that certainty which is necessary in order to justify a verdict of guilty (Per Lord Hewart CJ in *R v. Wallace* (23 Cr App Rep 32) applied by Thomson CJ in *Jubri v. PP* [1962] MLJ 34). I accordingly have no option but to acquit and discharge both the accused without calling the defence. It has been a lengthy trial and this court wishes to place on record its appreciation for the meticulous and strenuous preparation of and closely argued submissions on the part of both, the defence counsel and the learned deputy.

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***Postscript***

(When, on 22 May 1998, this judgment was delivered, I had expressed my hope that, an appeal if any, against my decision, may afford the prosecution an opportunity to have the common ratio in the cases of *PP v. Mohd bin Ambunani* [1994] 4 CLJ 871, *PP v. Alex bin Hamzani* [1995] 3 CLJ 102, (which I have now followed) – on the issue of the minimum amount of dangerous drugs required to be tested in order to raise the presumption under s. 37(da) – resolved at the appellate court level. However, as at today, 27 June 1998, no notice of appeal has been filed, and the court understands that the prosecution does not intend to appeal against this judgment.)